COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-395

AUDIE STONE,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

REPLY BRIEF TO PETITION FOR WRIT OF CERTIORARI TO THE TENNESSEE COURT OF CRIMINAL APPEALS

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INTRODUCTORY STATEMENT

The Tennessee Court of Criminal Appeals granted the State's motion to dismiss the appeal (Petition, at page A1).

The Petitioner, Mr. Stone, was tried by a jury and convicted of both petit larceny and assault and battery, the State's proof being that Petitioner by use of a pistol forced the victim to pay him a disputed debt (Petition at 5-6).

The constitutional errors which Petitioner urges upon this Court are as follows:

1. Prejudicial denial of a continuance
2. Ineffective assistance of counsel
3. Denial of a right to appeal

ARGUMENT

A. The Trial Judge Did Not Improperly Deny a Continuance.

From the petition itself it appears that the Court stated: "Mr. Summers [defense attorney], if you are making a motion for a continuance, I am going to overrule you. I talked to his doctor personally, and his doctor assured me that he was well able to stand trial, so I am going to overrule you" (Petition, at 3). This alleged error has not been preserved. No offer of proof was made to the trial judge and at this date no offer of proof has yet been made to anyone.

There is no allegation that the defense was hampered by Mr. Stone's physical condition.

B. The Petitioner Has Not Been Denied His Right to Effective Assistance of Counsel.

Mr. Stone in his petition filed herein takes the position that his own privately retained attorney kept him off the witness stand until he would have been the last witness, well knowing that Tennessee law requires a defendant to testify first or not at all, and this as a matter of law amounts to incompetence of counsel. Defendant knew he could testify and that he had that right. He was aware that Tennessee law requires the defendant to testify first or not at all (Petition, at 4). Knowing the same, Defendant through retained counsel, made a deliberate choice not to testify. He should not be allowed now to profit from his decision not to testify, a decision made with the advice of an attorney chosen and paid by him.

C. Petitioner Was Not Denied an Appeal Because He Voluntarily Relinquished His Right of Appeal.

Tennessee Code Annotated §§ 40-2901 et seq.[1] give the trial judge authority to suspend sentence where the maximum punishment does not exceed ten years. The Tennessee Supreme Court has held that after an appeal, the trial court cannot grant probation because the "trial court has lost jurisdiction of the cases by an appeal of the parties to this Court [Tennessee Supreme Court]." **Hethcoat v. State**, 213 Tenn. 563, 565, 376 S.W.2d 478 (1964). **Accord, Helton v. State**, 195 Tenn. 491, 260 S.W.2d 260 (1953); **Atchley v. State**, 176 Tenn. 574, 144 S.W.2d 748 (1940); and **Anderson v. Thompson**, 75 Tenn. (7 Lea.) 259 (1881).

The Tennessee Court of Criminal Appeals, Eastern Division, recently reaffirmed this principal in **Sams v. Russell** (unreported, filed July 31, 1970). This opinion is reproduced as Appendix B to this brief.

The rule that one who voluntarily applies for probation or parole waives his right to appeal by acquiescence in the judgment is known in the federal courts as the **Mooneyham** rule. See, **State v. Mooneyham**, 192 Kan. 620, 390 P.2d 215, **cert. denied** 377 U.S. 958, said rule being held constitutional by the Tenth Circuit in **Mooneyham v. State of Kansas**, 339 F.2d 209 (10th Cir. 1964).

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[1] Tenn. Code Annot. §§ 40-2901-2904 are reproduced as Appendix A to this brief.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted

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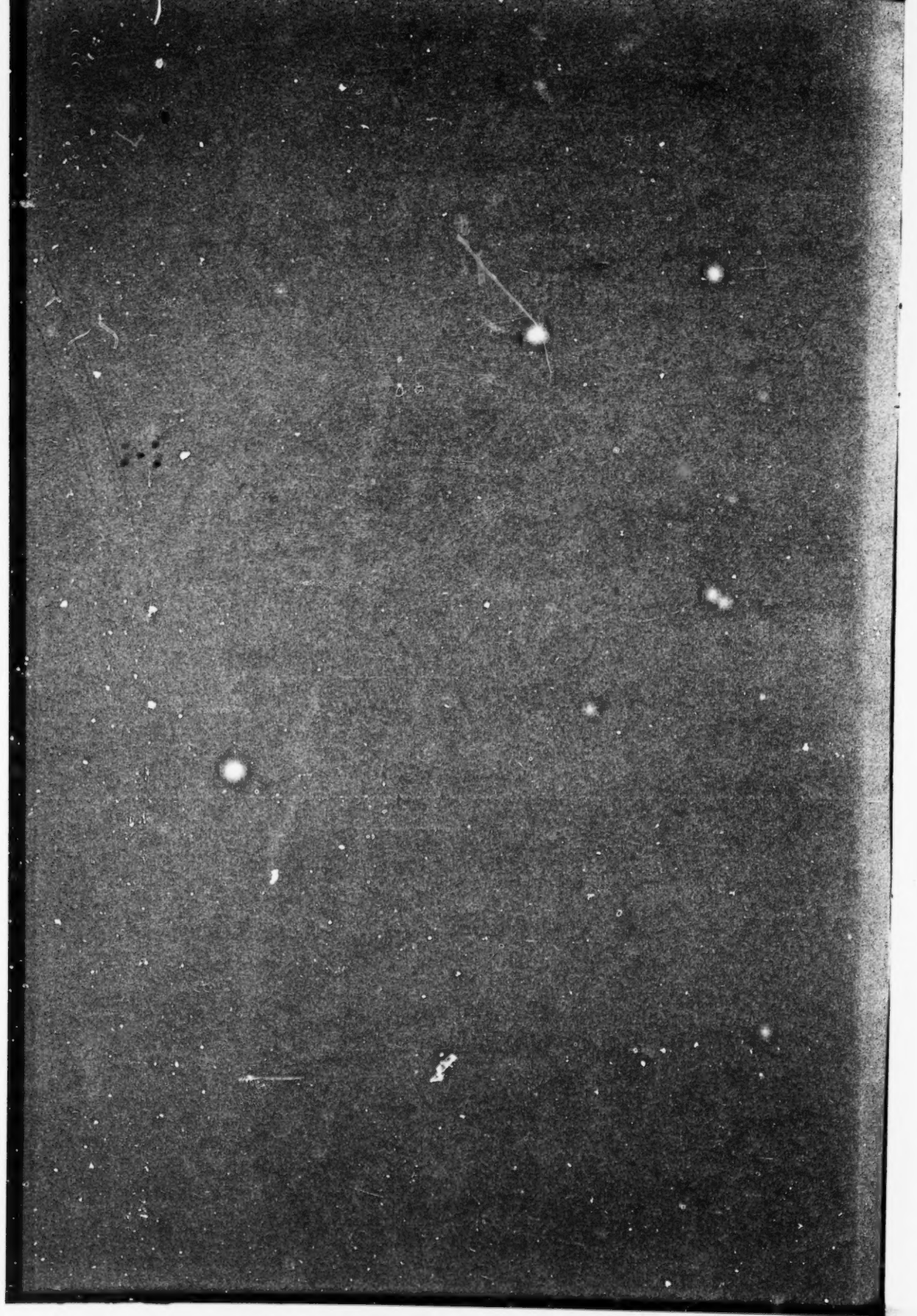

APPENDIX A

Tenn. Code Annot.:

SUSPENSION OF SENTENCE

40-2901. Powers of trial judge—Costs.—Whenever any person has been found guilty of a crime upon a verdict or a plea of guilty, all trial judges in the state having criminal jurisdiction are authorized and empowered to suspend the execution of sentence and place the defendant or defendants on probation, subject to such conditions as the trial judge may deem fit and proper. The trial judge shall possess the power to set the duration of such suspension at any period of time equal to the minimum sentence, but not more than the maximum sentence provided for the offense committed by the defendant or defendants, and to terminate the balance of such suspension at any time not less than the minimum provided for the offense committed by the defendant or defendants. For the purpose of this chapter, trial judges shall be held to include a trial judge before whom such defendant was tried and convicted, and shall also include the successor of such trial judge. As used in this chapter, the word "defendant" means any person convicted of a misdemeanor or convicted of any felony, the maximum punishment for which does not exceed ten (10) years' confinement in the state penitentiary. The trial judge shall have discretionary authority to suspend a sentence and place the defendant on probation without requiring that the defendant first either secure or pay the costs accrued in the case at the instance of the state. [Acts 1931, ch. 76, § 1; C. Supp. 1950, § 11802.1; Acts 1961, ch. 95, § 1; 1963, ch. 192; § 1; 1967, ch. 101, § 1.]

* * * * * * *

40-2902. Entry of judgment and suspension—Probation.—Any trial judge desiring to suspend a sentence and place the defendant or defendants on probation as provided for in § 40-2901, shall first pronounce judgment against the defendant or defendants and then shall suspend the execution thereof by placing the defendant upon probation, subject to such conditions of probation as the trial judge shall deem fit and proper and shall direct that such defendant or defendants be under the supervision of the board of probation and paroles created under § 40-3601, et seq., except in those counties which have their own probation officers. The trial judge shall cause the judgment, the suspension of imprisonment, the duration of the probation period, the conditions of the probation, and date of termination of probation to be entered on the minutes of his court in the same minute entry, and copies of such minute entry shall be delivered to the probation and paroles officer and to the probationer. [Acts 1931, ch. 76, § 2; C. Supp. 1950, § 11802.2; Acts 1961, ch. 95, § 2; 1963, ch. 192, § 2.]

* * * * * * * *

40-2903. No suspension after service of part of sentence—Exceptions.—No trial judge shall have the authority under the provisions of § 40-2901, to suspend the execution of sentence after the defendant shall have begun to serve such sentence, except where the sentence is to confinement in the county jail or workhouse for a period of time less than one (1) year, with or without a fine. In such cases, the trial judge, may, at any time after the defendant has actually served not less than thirty (30) days of such jail or workhouse sentence, suspend the remainder thereof despite the expiration of the term of court at which such judgment was pronounced or an earlier refusal to suspend in toto such judgment. Nothing herein shall be construed as granting to trial judges the right to

suspend the payment of fines except at the term at which judgment therefor was rendered. [Acts 1951, ch. 35, § 1.]

* * * * * * *

40-2904. Investigation and report by probation and paroles officer—Supervision of parolee.—The power of suspension and probation is within the sole discretion of the trial judge, however, when a probation and paroles officer is available to the court, no defendant shall be placed on probation until a written report of investigation by a probation and paroles officer shall have been presented to and considered by the court, provided the probation and paroles officer to whom such matter has been referred shall file his report within ten (10) days after such reference. Said report shall inquire into the circumstances of the offense, criminal record, social history, and present condition of the defendant. Whenever the trial judge deems it desirable, such investigation shall include a physical and mental examination of the defendant, the expense of which shall be adjudged as part of the costs. All persons released on probation shall be subject to the direct supervision of the board of probation and paroles, and each such probationer must report as directed to his probation and paroles officer until release from supervision. No probationer shall be allowed to leave the jurisdiction of his probation and paroles officer without the express permission of the trial judge. [Acts 1931, ch. 76, § 2; C. Supp. 1950, § 11802.2, Acts 1961; ch. 95; § 4; 1963, ch. 192, § 3.]

* * * * * * *

APPENDIX B

The Court of Criminal Appeals of Tennessee
Knoxville

Joe Mack Sams and Carl Neer, Plaintiffs in Error, v. Lake F. Russell, Warden, Defendant in Error.	No. 10 Anderson County Honorable Roland Prince, Judge (Sitting by Interchange) (Habeas Corpus)

* * * * * * *

Opinion Filed: July 31, 1970.

Affirmed:

W. Wayne Oliver, Judge. **UNREPORTED**

OPINION

Joe Mack Sims, the petitioner below, now indigent and represented in this proceeding by court-appointed counsel, an inmate of the State Penitentiary where he is serving a three to four year sentence adjudged by the Criminal Court of Anderson County upon his conviction of third degree burglary, appeals to this Court from the judgment of that court dismissing, after a full evidentiary hearing, a habeas corpus petition filed by him and his co-defendant Neer. Neer has not appealed. Sams was represented in his trial by retained counsel.

The petition for the writ of habeas corpus, as amended, attacked the petitioners' conviction upon the grounds (1) that they were denied their right of appellate review because their counsel failed to file a motion for a new trial and perfect their appeal to this Court, notwith-

standing "that they did everything within their power to compel their attorney to appeal the case, but to no avail," and (2) that the trial jury was tampered with during the trial by prosecution witnesses talking to some of the jurors while the jury was illegedly separated and not under the supervision of an officer, and that they were thereby denied their constitutional right to a fair and impartial trial.

The State's answer denied that any prejudicial error occurred during the trial, and specifically stated that the petitioners did not desire to appeal their convictions and filed a petition for probation in the trial court.

In dismissing the petition, the trial court entered a written finding of fact holding (1) that the petitioners were fully advised by their retained counsel and did not request their counsel to take any step toward perfecting an appeal from their convictions, and agreed to file a petition for parole instead of a motion for a new trial, and (2) that the jury was not separated during the trial and no juror was approached or talked to by any person.

Sams' Assignments of Error here challenge the trial judge's finding and dismissal of his petition. In considering these Assignments, we must adhere to the settled rule that the findings of the trial court, upon questions of fact, are conclusive unless this Court finds that the evidence preponderates against the lower court's judgment. **State ex rel. Hall v. Meadows**, 215 Tenn. 668, 389 S.W.2d 256; **State ex rel. Johnson v. Mainard**, 188 Tenn. 501, 221 S.W.2d 531; **Gray v. Johnson**, 354 F.2d 986 (6th Cir. 1965); **Bates v. Meadows**, 358 F.2d 674 (6th Cir. 1966); **State ex rel. Lawrence v. Henderson**, ... Tenn. Crim. App. ..., 433 S.W.2d 96.

Our Supreme Court has held many times that the findings of a trial judge in an oral hearing, who sees and hears the witnesses testify, and hears and considers con-

flicting testimony, will be given the weight of a jury verdict. **Taylor v. State**, 180 Tenn. 62, 171 S.W.2d 403; **Atlas Powder Co. v. Leister**, 197 Tenn. 491, 274 S.W.2d 364. In the **Atlas Powder Co.** case, the Court adopted the principle that the trial judge who hears the witnesses testify is the judge of their credibility the same as a jury is in a jury case, and adopted the following statement from **Ferguson v. State**, 138 Tenn. 106, 196 S.W. 140:

> "We have said in numerous cases that the verdict of the jury determines the credibility of witnesses. This is necessarily so. We do not see the witnesses nor hear them testify, and mere discrepancies in their testimony must be deemed settled by the verdict of the jury unless there is something to show that such discrepancies originated in willful falsehood."

Upon a careful review of this record, we cannot hold that the evidence preponderates against the findings and judgment of the trial judge.

Aside from the well-settled principle of law that the failure of Sams' retained counsel to perfect an appeal of his conviction was imputable to him and not to the State, **State ex rel. Dych v. Bomar**, 213 Tenn. 699, 378 S.W.2d 772; **Russell v. State ex rel. Arthur**, 218 Tenn. 118, 401 S.W.2d 586; **State ex rel. Johnson v. Heer**, 219 Tenn. 604, 412 S.W.2d 218; **State ex rel. Donehue v. Russell**, 221 Tenn. 609, 429 S.W.2d 818, he confronts here an equally fundamental and insuperable barrier.

In the hearing upon this petition, the State introduced a copy of Sams' sworn petition for probation and suspension of his sentence, which he filed, pursuant to TCA, §§ 40-2901, et seq., on the 9th day of the 10 days allowed by the trial court for filing a motion for a new trial. In this petition for probation and suspension of sentence, Sams stated, *aliunde:* (1) that he has been indicted and

convicted of third degree burglary and sentenced to four years in the penitentiary, (2) that "he is very sorry for what he did; that he has worried a great deal about what has happened; and that he is willing to be placed on probation for any amount of time that the Court sees fit," (3) that he "realizes what a serious mistake he made, and that he realizes he has brought shame upon himself, his family, and realizes now more than ever what it means to abide by all laws and be a useful citizen in the community in which he lives." He agreed to pay all the costs of the cause, and prayed the court to place him on probation and suspend his sentence. The petition was signed by him and his retained trial counsel.

By filing that petition, Sams waived his right to appeal his conviction. By admitting his guilt of the crime of which he was convicted and expressing penitence he placed himself in the same attitude, insofar as his right of appeal was concerned, as if he had knowingly and voluntarily pleaded guilty at his trial. The law is settled in this State that there is no right of appeal from a legal conviction upon a knowledgeable and voluntary plea of guilty. **McInturff v. State**, 207 Tenn. 102, 338 S.W.2d 561.

An application for probation and suspension of sentence is not available as a means of urging errors in the conduct of the trial. **People v. Erickson**, 74 Cal.App.2d 399, 168 P.2d 417. By the very nature of such a proceeding, appealing to the court for mercy, its purpose is not to contest the conviction and sentence; instead, it concedes the validity of both. Thus, the convicted defendant who files a petition for probation and suspension of sentence thereby waives his right of appeal upon exactly the same principle which precludes appeal by one convicted upon a plea of guilty understandingly and voluntarily entered.

Probation is merely the condition resulting from a suspension of sentence. **State ex rel. Wilson v. Lowdermilk**, 245 Ind. 93, 195 N.E.2d 476.

By asking that his sentence be suspended and that he be released on probation, the convicted defendant says to the court, in effect, that he was rightly convicted. He may not thus admit guilt to escape imprisonment and at the same time protest his innocence and insist upon reserving a right of appeal to challenge his conviction. His voluntary application for suspension of the execution of the sentence and release on probation constitutes recognition of the validity of the judgment and acquiescence therein and a waiver of the right of appellate review. **State v. Walker,** 196 Kan. 464, 413 P.2d 128.

The sound basis of the underlying theory of the rule was well expressed by the Supreme Court of Kansas in **State v. Robertson,** 193 Kan. 668, 396 P.2d 323:

> "He is precluded from appealing, not because he expressly and understandingly waived such right, but because he expressly and understandingly took action which, in and of itself, was inconsistent with an intention to appeal. Since his request for parole, and the consequent acquiescence in the judgment and its validity, was intentionally made, the fact that the appellant may not have understood that he would be bound by the reasonable and logical implications of his action, thereby foreclosing an appeal is immaterial."

The Court also held in **State v. Robertson,** supra, that the rule applies regardless of whether the defendant was specifically advised of his right to appeal or not. And in **Sanders v. State,** 195 Kan. 701, 408 P.2d 587, that Court held that a defendant acquiescing in and recognizing the validity of the judgment of conviction by seeking and securing probation is not permitted to challenge the validity of that judgment in a collateral proceeding. The Court said: "To hold otherwise would be to say that appellant can now accomplish a result in a collateral proceeding that he could not have attained by direct appeal."

Of course, it must be conclusively presumed that a convicted defendant who files with the trial court an application for suspension of his sentence and release upon probation does so in good faith and with the full intention of accepting probation if granted by the court. So, the established principle that such an application precludes the right to seek appellate review of the conviction follows inexorably from, if indeed it is not an inseparable part of, the settled rule of law that one who is successful in such an application has no right of appeal.

In **People v. Dowd**, 27 Ill.App.2d 429, 170 N.E.2d 179, the Court said:

> "At the outset it is clear that if defendant, by his motion for probation made after the court denied his motion for new trial, waived his right to appeal, then all other points raised by defendant are moot. The rule in the state is clear that where a defendant moves for release on probation which is granted, and affirmatively assents to the order granting probation and accepts the benefits of probation, his choice between the suspension and contesting the judgment of conviction should be final. He should not be permitted to reverse his stand and take advantage of the alternative he had theretofore rejected."

In **State ex rel. Wilson v. Lowdermilk**, supra, the Indiana Supreme Court said: "In event the defendant accepts the benefits of a suspended sentence and goes at liberty under the terms of the probation, he may not thereafter appeal."

Stating the general rule that the voluntary acceptance of a suspended sentence and probation or parole waives the defendant's right to appeal, the author of an annotation in 117 A.L.R., beginning at page 929, says that the reasons for this rule are probably better stated in **Brooks**

v. State, 51 Ariz. 544, 78 P.2d 498, 117 A.L.R. 925, than in any other decision. We agree. In that case the Court said:

> ". . . His choice between the benefits of suspension and contesting the case further is final, hence, he cannot thereafter reverse his stand and take advantage of the alternative he had theretofore rejected. By choosing probation he is automatically estopped from appealing and by deciding in favor of appeal he estops himself from benefitting from suspension. He cannot profit from both at the same time, or as the old saying runs, 'He cannot eat his cake and have it too.' "

See also: **Renado v. Lummus**, 205 Mass. 155, 91 N.E. 144; 24 C.J.S., Criminal Law, § 1668, p. 1048.

The judgment of the trial court reached the correct result in dismissing this petition, and is affirmed.

/s/ W. WAYNE OLIVER
W. WAYNE OLIVER
Judge

Concur:

.....
MARK A. WALKER
Presiding Judge

.....
ORIS D. HYDER
Judge